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All emphasis is ours unless otherwise indicated.
We use record references and abbreviations as in Petitioner's Brief.

In the Supreme Court of the United States

OCTOBER TERM 1965

No. 20

CARNATION COMPANY, a corporation,
Petitioner,

vs.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, FAR EAST CONFERENCE, an unincorporated association, and other named persons, defendants, and Federal Maritime Commission, intervener,
Respondents.

Petitioner's Reply Brief

I.

DEFENDANT-RESPONDENTS' CENTRAL POSITION THAT THE ANTITRUST LAWS WERE REPEALED HAS NO SUPPORT

With deference to the energies and learning of counsel for defendant-respondents, their euphemisms and circumlocutions do

not conceal that in an effort to sustain the judgment below they have been forced to take the position that the antitrust laws were, *pro tanto,* repealed by implication by *enactment* of Shipping Act, 1916.

The word "repeal" is anathema. We believe (without rereading defendant-respondents' briefs for verification of this precise matter) that it is not once used by defendant-respondents. Instead it is said that the antitrust laws, or the remedies of the antitrust laws (when the narrower expression will serve the purpose of the argument), have been "superseded" by Shipping Act, 1916, and particularly, by § 15 of the latter Act. The purpose is obvious. It is hoped, thus, to avoid coming to grips with the cases in Respondents' Brief, p. 50ff, dealing with the doctrine of repeal by implication and its stringent requirements, and holding the doctrine inapplicable where, as in the case at bar, there was a claim of conflict between the antitrust laws and an industry regulating statute: *Georgia v. Penn. R. Co.,* 324 US 439, *United States v. Borden Co.,* 308 US 188, *Silver v. N. Y. Stock Exchange,* 373 US 341, and *United States v. Philadelphia Nat. Bk.,* 374 US 321. Cf. *Hewitt-Robins v. Eastern Freight-Ways, Inc.,* 371 US 84, 89.[1] Secondly, it is hoped to get some virtue from the use of the word "supersedes" in *U. S. Nav. Co. v. Cunard Co.,* 284 US 474, where it was used in another context and for another purpose.

There can be no question of the meaning of "supersession" as used by defendant-respondents. They distinguish sharply be-

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1. Here the question was not of survival of a statutory scheme but of a common-law remedy in the face of an industry regulating statute. "Survival" of the remedy was held to depend not on whether the industry statute provided remedies but "depends on the effect of the exercise of the remedy upon the statutory scheme of regulation." Cf., also, *Pan American Pet. Corp. v. Superior Court,* 366 US 656 holding the Natural Gas Act, 15 USC § 717ff did not deprive state courts of jurisdiction to entertain actions on contracts. Cf., also, *Laburnum,* 347 US 656, *Gonzales,* 356 US 617 and *Russell,* 356 US 634, dealt with in note 30 at page 32 of Petitioner's Brief.

tween the doctrine of primary jurisdiction and their doctrine of "supersession."[2] They are clear that it is their doctrine of supersession upon which they rely, not the doctrine of "primary jurisdiction" (*United States v. Western Pac. R. Co.*, 352 US 59, 63, quoted in Petitioner's Brief at p. 70),[3] and that their doctrine of "supersession" means that the antitrust statutes are removed from *all* consideration, not by reason of anything done by the agency charged with its administration (the Government supervision and control that is the core of the regulatory scheme), but by force of *enactment* of the statute alone.[4] This is the position urged and rejected in *United States v. Borden*, 308 US 188, holding that where, as here, the scheme was of Government supervision with power conferred upon an administrative agency, in the performance of *its* supervisory functions, to exempt from the operation of the antitrust statutes, it was the action of the agency exempt-

2. Indeed, we are charged with confusing the two (see FEC Brief, p. 36).

3. FEC Brief, p. 37, says: "The primary jurisdiction doctrine does not come directly to bear on the problem *until the antitrust laws have been disposed of, for those laws clearly contemplate court jurisdiction.* It is the supersession doctrine which *eliminates the antitrust laws* from the picture." It is further argued "that § 15 is the superseding law of agreements, combinations, and conspiracies for ocean carriers" (p. 35).

4. So in the PWC Brief we find: The question is stated as whether "the remedies and penalties of the Shipping Act here supersede the remedies and penalties of the Sherman Act" (p. 2). A section heading is "Congress intended Shipping Act remedies to supersede antitrust remedies" (p. 29) and it is flatly stated "that the antitrust laws do not apply to unfiled § 15 agreements" (p. 49). The FEC Brief to begin with, correctly, contends that "Congress substituted a program of *regulated* agreements, in the case of ocean carriers, for the outright prohibition of the antitrust laws, *with the regulation to be done by the Commission*" (p. 6), but it thereafter drops the reference to the *regulating* aspects and argues, of course, that even unapproved agreements are not subject to the antitrust laws. At p. 16 it states that the rule that there is no antitrust violation "applies whether the agreement or combination or working arrangement is claimed to have been filed with the Commission or not." Compare n. 3 above.

ing, and not the existence of the power, which worked the exemption.[5]

Defendant-respondents take this position neither willingly nor graciously.[6] They are forced to the full length of their argument because now, in no other way, can the judgment of dismissal be saved. The judgment cannot be saved if petitioner's position is correct, i.e., that though in some cases of claims of violation of the antitrust statutes by ocean carriers in foreign commerce, at some stage in the proceedings, there may appear a question that should be referred to the Commission, this is not such a case.[7] It is

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5. See also the other cases, dealt with along with *United States v. Borden Co.* in Petitioner's Brief at page 63ff, where there was no exercise of exempting power.

The result is the same in cases where the statute provides for administrative consideration of proposed action and confers power to prevent it but does not provide for antitrust exemption as in *United States v. R.C.A.*, 358 US 334, *California v. Fed. Power Com'n*, 369 US 482 and *United States v. Philadelphia Nat. Bk.*, 374 US 321.

6. See Footnote 9 below.

7. There is no occasion to repeat what we already have said of the primary jurisdiction doctrine is (see Petitioner's Brief p. 67ff). We recognize, of course, that in some actions against ocean carriers, brought under the antitrust statutes, an administrative question could arise which properly, under the primary jurisdiction doctrine, should be referred to the Commission. Such a question might be apparent at the very beginning of the antitrust litigation, or it might not appear until a later stage. Referral to the Commission would be appropriate whenever such a question appeared (*General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 US 422; *United States v. Western Pac. R. Co.*, 352 US 59; *United States v. Chesapeake & Ohio Ry. Co.*, 352 US 77). But there is no logic which says that a question proper for referral must necessarily arise in all actions brought against members of a regulated industry for alleged violation of the antitrust statutes. Whether there is a question, appropriate for referral, is not a foregone conclusion but must be determined case by case "based on the particular facts of each case" (*United States v. Western Pac. Ry. Co.*, 352 US 59, 69). It is our position that there is no such question in the case at bar; that the questions presented are usual and traditional in antitrust litigation, entirely familiar to courts and in respect of which courts from their own experience have all the competency that could be claimed for an administrative agency, and that, by consequence, under *Great Northern R. Co. v. Merchants Elevator Co.*, 259 US 285, the *Meat Cutters Case, Local Union etc. v. Jewel Tea Co.*, 381 US 676, and like cases, this is a case where no referral ever was or is called for.

equally apparent, now, that if the Solicitor General's position is correct, i.e., that there was a preliminary question for the Commission, that the case in the District Court should have been stayed until the determination by the Commission and should proceed only in the light of the determination made by the Commission which, in theory, might require dismissal as in the second *El Dorado Case,* (*El Dorado Oil Works v. United States,* 328 US 12[8]), in view of determination actually made by the Commission the case must proceed to trial.[9] Defendant-respondents would like to be able to argue that even if the antitrust laws were not repealed by Shipping Act, 1916, still in some cases under the primary jurisdiction doctrine it is appropriate to dismiss an action under the antitrust statutes and that this was such a case. But the action taken by the Commission forecloses the argument.

Defendant-respondents can find no support for their position of repeal in the language of the statute. If Congress wanted the result argued for,—as to ocean surface carriers complete substitution of the Shipping Act 1916 in place of the antitrust statutes,

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8. Cf. *Far East Conference v. United States,* 342 US 570, 576, and cases cited and Petitioner's Brief p. 85, n. 78.

9. Defendant-respondents have argued that it is not appropriate to take the position that this case, when it was commenced, if there were an administrative question, was one appropriate for a stay and referral to the Commission, the case to proceed after the Commission had made its determination because, so it is said, petitioner never took that position and it is not now open to the Solicitor General to take that position because this would be a reversal of position taken by the Commission as intervener below. The answers to this suggestion are short.

The position of petitioner below was simple. It was never offered a choice. It was faced with the motions to dismiss and it resisted dismissal. If the motion were properly granted that ended the matter. But, in considering the matter, it was for the court to determine whether the proper course were dismissal, or stay pending Commission determination, or trial without referral. Indeed, the question of retention and stay, as against dismissal, was considered and passed upon by the Court of Appeals (R. 186, 336 F2d 650, 667).

Whether or not it is open to the Solicitor General to question the decree, as an appellant could, is beside the point. The Solicitor General is entitled to confess error on *our* appeal. (Cf. *Bozza v. United States,* 330 US 160, 163).

by force of enactment of the Shipping Act alone,—it would have been a very simple matter for Congress to have said so, as the Solicitor General very pointedly suggests (Brief, pp. 20, 21. Cf. the repeal provision of the Transportation Act of 1940, Interstate Commerce Act, Part III, § 320, 49 USC § 920, App. to Petitioner's Brief, p. 50). A very slight change in the wording of the statute would have accomplished this with absurd ease. It also would have worked a marked departure from settled Congressional policy.[10]

Not only is there nothing in the language of Shipping Act, 1916, which lends support to defendant-respondents' argument of supersession (repeal) but the only language bearing upon the subject is to the contrary. (Petitioner's Brief p. 62ff) If, in the language of this Court (*United States v. American Union Transport*, 327 US 437, 447, n. 8) "in view of the statute's plain language" (Shipping Act, 1916 § 15) the exemption from the antitrust statutes "arises *not* upon the mere filing of the agreement *but only after approval* by the Commission" (emphasis in original) certainly an agreement is not exempt *before* approval by the Commission and most certainly is it not exempt where there has not even been filing and the Commission has had no opportunity to either approve or disapprove and take steps to prevent statutory violation. There is nothing to suggest the statute is putting a premium on avoidance of detection.

Defendant-respondents can get no comfort from the traditional doctrine of repeal by implication which requires that the statutes being compared be "absolutely irreconcilable" for a repeal by implication to be worked (*United States v. Greathouse*, 166 US

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10. We are not aware of any industry which has been completely exempted from the antitrust statutes. Certainly the railroads, the most thoroughly regulated of industries,—the classical example,—have not been completely exempted (*Georgia v. Penn. R. Co.*, 324 US 439). Not even labor unions are given blanket exemption (*United Mine Workers of America v. Pennington*, 381 US 657).

601, 605; Petitioner's Brief p. 50ff) and, indeed, defendant-respondents do not, and dare not, look to this doctrine for support.

Defendant-respondents do try to find support for their position in *U. S. Nav. Co. v. Cunard S. S. Co.*, 284 US 474, and *Far East Conference v. United States*, 342 US 570. But those are primary jurisdiction cases and not repeal by implication cases. If *Cunard* really meant repeal by implication (and not, where there is an appropriate administrative question, a mere preliminary employment of an administrative remedy "which *to that extent* supersedes" of the antitrust statutes) the court certainly expressed itself in a very curious way, took a very roundabout and ambiguous way of expressing what could have been said simply, directly and very shortly if it really meant repeal, and made a very poor selection of authorities to support its result when the authority whose reasoning was principally relied on *Great Northern R. Co. v. Merchants Elevator Co.*, 259 US 285, is one of the leading primary jurisdiction cases, is the leading case setting the limits of application of that doctrine and is a case which itself held that there was not there presented any administrative question which was an impediment to immediate processing of the case through the courts. As for *Far East Conference*, the decision was clearly wrong, if Shipping Act, 1916, worked a repeal of the antitrust statutes, when it said: "Having concluded that initial submission to the Federal Maritime Board is required, we may *either order the case retained* on the District Court calendar pending the Board's action (citing the two *El Dorodo Cases*) *or* order dismissal of the proceedings brought in the District Court." If the antitrust laws were really so "superseded" that they had no possible application to agreements of ocean carriers in foreign commerce, before filing and without approval, then the court had no choice but to dismiss.

If *Cunard* and *Far East Conference* really support defendant-respondents' position of supersession by *enactment* of the Shipping Act, 1916, then this court committed grave error in *Federal Maritime Board v. Isbrandtsen Co.*, 356 US 481, 498, when it said:

> "Thus the Court's action in *Cunard* and *Far East Conference* is to be taken as a deferral of what might come to be the ultimate question—the construction of § 14 Third—rather than an implicit holding that the Board could properly approve the practices there involved. The holding that the Court had primary jurisdiction, in short, was a device to prepare the way, *if the litigation should take its ultimate course,* for a more informed and precise determination * * *."[11]

And if this court was in error in this *Isbrandtsen Case* it compounded the error in *United States v. R. C. A.,* 358 US 334, 348, in its citation of *Cunard* and *Far East Conference* for the proposition there stated and citing them *"as explained* in *Federal Maritime Board v. Isbrandtsen Co.,* 356 US 481, 497-499".

In *Cunard* and *Far East Conference* dismissal were proper, not because in *every* case against ocean carriers in foreign commerce the Shipping Act, 1916, provided complete relief through Commission action but because, *so far as appeared at the time,* in those cases a cease and desist order would provide all the relief an injunction would provide, if any relief in specie and in futuro were proper, *Far East Conference* being careful to add that if this turned out not to be the case an action would lie.

We need not spell out again that the mere existence of an industry regulatory statute and the mere possibility of conflict between the administrative agency set up to police it and the courts lend no support to the position of defendant-respondents or work a *pro tanto* repeal of the antitrust laws. "Regulated industries are not *per se* exempt from the Sherman Act." (*Georgia v. Penn. R. Co.,* 324 US 439, 456)

The cause should not have been dismissed. Whether proceedings should have been stayed in the beginning or not, there is now no occasion why it should not be sent back to go to trial in ordinary course.

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11. It further said that the holding in *Cunard* was that "the courts could not entertain the suit *until* the Board had considered the matter" (p. 496); not that an action never could be entertained.

II.

PETITIONER'S CLAIM AND WHAT THE COMMISSION DECIDED

Some things just said presuppose a knowledge of the decision of the Federal Maritime Commission of July 28, 1965, in Joint Agreement etc. (No. 8200), its Docket No. 872. So far as material its decision is set out in the Appendix to Petitioner's Brief p. 52ff.[11a] The parties can, of course, state their own position with respect to the effect of that decision and the Solicitor General and the FEC Brief, in effect, do so. We think a fair statement of their positions is that any administrative questions presented that were for determination by the Commission, before petitioner could proceed with its litigation, have been determined, and in such way that petitioner is entitled to pursue its litigation unless, of course, as argued by defendant-respondents, the antitrust statutes have been completely supplanted and no action based upon the antitrust statutes can be maintained against the common carrier by water in foreign commerce. PWC's Brief does not really take issue with this. It does, however, by calling attention to language of the Commission, endeavor (if we can update an old expression) to blow some smog into the air.[12] Accordingly, and for convenience, we briefly restate certain of the facts upon which petitioner relies and then excerpt the directly related language of the Commission.

The complaint identified the parties, spelled out the formation of PWC and FEC, averred the making of Agreement No. 8200 and pointed out its provision for independent action (Complt. par. 17, R. 18, 19,—the Agreement is set out in full at R. 45ff). It then averred that this Agreement notwithstanding, the defendants agreed to fix rates not as there provided and not as provided in their Conference agreements but that all the defendants should

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11a. As proof of this Reply Brief is corrected and returned to the printer we are informed that the Commission has disposed of applications for reconsideration but have not seen the order.

12. See pp. 5, 8 but cf. 9, 10, 21.

fix rates for the members of PWC, that the rates so fixed should be given out as though fixed by PWC and that rates for members of PWC should not be changed "without the concurrence of defendant FEC, except a rate * * * in a list * * * known as a 'list of initiative items' in respect of which defendant PWC might establish rates without the concurrence of defendant FEC" (Complt. par. 18, R. 19, 20). The complaint was directed at the rates for an item *not* on the "initiative list" and it alleged that the *"list of initiative items did not include condensed and/or evaporated milk* until * * * May 1961" (Complt. par. 19, R. 20). What was charged, in this regard, was not that No. 8200 had been modified to eliminate its provision for independent action entirely or that this provision had been *generally* modified, but the charge was that there was an unfiled and unapproved side or supplementary agreement *calling for concurrence of both conferences in the change of rates which were not on the initiative list* and, that since evaporated milk was *not* on the initiative list, what was done in raising the rates on evaporated milk and refusing to lower them because FEC would not concur was a violation of the antitrust statutes to the damage of petitioner.

The Commission filed an answer which did *not* deny these averments. (R 36, 37) And with good reason.

This is what the Commission found:

The Commission was not concerned with antitrust violations. The Commission has no jurisdiction to enforce the antitrust statutes or to adjudicate antitrust violations as such. It was concerned with the Shipping Act and, more particularly, whether Agreement No. 8200 was in such form that, as filed with it, it could continue to be approved.

Upon a review of the evidence the Commission found, and we believe correctly, that Agreement No. 8200, as on file with the Commission, and as to the right of initiative action, had not been generally modified; that there had been no blanket surrender of the right of initiative action; that, accordingly, the agreement as

such was in form to be approved. There never has been a claim that PWC gave up *all* right of independent action. But petitioner did claim that by setting up the concurrence procedure for items *not* on the initiative list, *as to these items PWC did give up the right of independent action;* that the rates *which were in fact charged* for carriage of petitioner's evaporated milk were rates *not fixed by PWC acting independently* but were rates fixed under the unapproved provision for concurrence in the fixing of rates not on the initiative list. The Commission found that this was true.

Whether this is properly said to be not a modification of No. 8200 is largely beside the point. The point is that what Carnation was forced to pay was determined under an *unapproved* agreement to fix prices.

The Commission found specifically:

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> The members of the respondent Conferences have met and adopted resolutions or have *collectively agreed to a common course of action* at meetings held at least annually since 1953, as evidenced by written minutes which were furnished to the Board and the Commission.

* * * * * * *

I. *The supplementary agreements.*

We now come to the first issue set out in the Order of Investigation, which is: Is Agreement No. 8200 a true and complete agreement between the parties? The Examiner held that the agreement was not a true and complete agreement between the parties, and that the conferences should file various "supplementary agreements"[1] with the Commission for approval before reapproval of Agreement No. 8200 is given by the Commission. The respondent conferences have excepted to this finding, * * * *We disagreed with respondents* as to both of their arguments, for the reasons hereinafter state.

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1. These supplementary agreements which deal with placement of items on the *initiative list,* overland rates and *concurrence procedure* are described more fully, *infra.*

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We think that the holdings in the Commission decisions cited above clearly militate in favor of the position that the "supplementary agreements" were not within the purview of Agreement No. 8200 and were not routine, day-to-day arrangements which are exempt from the filing requirements of section 15. The *Associated Banning* case is particularly in point. It appears to us that Agreement No. 8200 is nothing more than evidence of a general intention of the parties to enter into concerted rate-making. It sets out no details, no procedures, with the exception of the procedures to be taken at the initial meeting, nor does it inform any interested person as to how the agreement is to work.

* * * * * * *

Thus, we hold that the supplementary agreements relating to *rate-making initiative,* overland rates, rate differentials and the *concurrence procedures* (encompassing all instances of the operation of the concurrence machinery except for the placement of items on the agenda of the initial meeting) *are without sanction in the basic Agreement No. 8200,* were therefore required by section 15 of the Shipping Act, 1916, to be filed with the Commission for approval, and, *not having been so filed, were and are being carried out in violation of the said section 15.*

* * * * * * *

(1) *The assignment of items to the initiative list is subject to concurrence,* * * *

(2) Rate changes on competitive items are subject to concurrence, * * *

(3) *Rate changes on initiative items are subject to concurrence where the conference requesting a particular change does not have the initiative* (i.e., such as the request for change in rate on evaporated milk when PWC did not have the initiative). This fact is borne out by the record developed in this case, and, more particularly, *by the facts pertaining to the charge of discrimination made by Carnation Company* (which will be discussed, *infra.*). These added instances of

the operation of the concurrence procedure appear to us to go far beyond an agreement to concur in matters voted on. Were we confined to the latter, we could agree with the Examiner that the basic agreement sanctions the concurrence procedure. However, the concurrence procedures touch other matters than the content of the agenda of the initial meeting. Respondents will therefore be required to *cease and desist from carrying out the concurrence procedures* until the same be filed with and approved by the Commission.

The initiative procedure provides a method whereby certain commodities are classified in two categories in such a way as to locate the power to change rates with or without agreement or concurrence. The conferences first agreed that the so-called "local initiative" rate-making authority would be established with respect to an agreed list of commodities if seventy percent of the total annual movement originated in either conference's local territory. Later, in 1956, the method of agreeing on the commodities to be listed was changed to require concurrence by the other conference before establishing "rate-making initiative on commodities, pursuant to the formula." An agreed list was then prepared.

The commodity *evaporated milk in 1953 was not classified and placed on the list of Pacific Westbound and remained off the list until 1961,* after this proceeding was instituted, even though in 1960-1961 ninety percent or more of the evaporated milk was moving from the West Coast to the Philippines. The record shows that *before 1961 Far East had refused to concur in such placement* in spite of the formula commitment the conferences made to each other regarding the seventy percent test.

A right to concur was established in May 1956, when it was agreed "authority to establish rate-making initiative on commodities pursuant to the formula defined in the preceding paragraph [the seventy percent formula] may only be granted . . . after concurrence by the other Conference."

Carnation, a shipper of evaporated milk, was affected before and after the right to concur was established. Before May 1956, evaporated milk remained off the initiative list of Pacific Westbound for no apparent reason, *and after May*

1956 because Far East would not concur. Apparently, no request should have been needed in either period to classify evaporated milk as an "initiative" commodity. Carnation's first record request for a rate change by Pacific Westbound was on November 11, 1957, after the addition of the concurrence procedure. *Carnation was unsuccessful because Far East would not concur, although at this time Carnation did not know why because the initiative list and concurrence procedure were still secret*[3] *as far as Carnation was concerned.* Carnation persisted in its efforts and *Pacific Westbound persisted in trying to obtain concurrence* (December 1957 through May 1958—13 exchanges between Far East and Pacific Westbound), but without success for three years, even though Far East was handling ten percent or less of the volume of evaporated milk shipped to the Philippines.

Both before and after the concurrence procedure was added, *Carnation and the public had every reason to believe that Pacific Westbound was making its own decisions* on rates based on the economics of shipment from the West Coast. It was developed in the record that *this was far from the case and not only was the concurrence procedure interfering with Pacific Westbound's initiative decisions,* but that Far East had conflicting interests in that it had to protect the movement of powdered milk from the East Coast. A shipper of powdered milk had demanded the same reduction as evaporated milk, so a change in the evaporated milk rate would affect the revenues of Far East members.

This conduct on the part of Far East and acquiescence therein by Pacific Westbound in the exercise of their respective powers shows that the seventy percent rule for giving the rate-making initiative, whether or not affected by the concurrence restriction, became a sham. The agreed-upon condition called for the exercise of independent action by Pacific Westbound, but it failed to act independently as it had a right to do under Article "SECOND" of Agreement No.

3. The minutes of the first meeting state that the "proceedings of minutes are confidential" and that "unauthorized disclosure to shippers of information regarding rate changes" and positions "regarding rate requests is contrary to the spirit of the Joint Agreement."

> 8200. Both Far East and Pacific Westbound, we hold, subjected Carnation, as a shipper; West Coast ports, as localities; and the commodity evaporated milk to unreasonable disadvantage in violation of section 16 of the Shipping Act, 1916. In our opinion the repondents' failure to abide by commitments when it suited the interests of the parties, without satisfactory reason, made the disadvantage "unreasonable."
>
> The supplementary agreements which we have found to have been unfiled and to have been required to be filed consist of oral agreements reduced to memoranda, in the form of abstracts or summaries of minutes of meetings. If it has been assumed that these are now before the Commission for approval, the assumption is misplaced. They are only before us in the form of exhibits in this record and cannot be treated as filed agreements. Filing pursuant to the regulations of the Commission is an essential prerequisite to an adjudication as to approvability. * * * We therefore reverse the Examiner to the extent that he found that Agreement No. 8200 should be reapproved after the amendments are filed. Should the parties to Agreement No. 8200 decide to file these supplementary agreements, they would then be in a form suitable for action by the Commission pursuant to section 15.

For the sake of completeness it should be added: Petitioner claims only that the increase in rate was illegal *per se* because in pursuance of a price-fixing agreement unfiled and unapproved and, by consequence, not exempted from the antitrust statutes. Petitioner does *not* charge discrimination. It does not plant itself upon any claim of "unreasonableness" of rates, but only that they were *per se* illegal, whether reasonable or unreasonable.[13] It makes

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13. PWC struggles to assert that we make a claim that would call for the exercise of administrative discretion or the use of special Commission expertise or on which different persons might differ. (See PWC Brief, p. 47.) It is not so. Nor do we charge a variety of wrongs as was the case in Cunard. (See PWC Brief, p. 13) FEC correctly states our position (FEC Brief, p. 46): "Petitioner's claim is not that the rates charged it were unreasonable. Its claim is that they were higher, by reason of the unlawful concerted action, than they otherwise would have been."

no claim for injunctive relief. Indeed, on petitioner's theory, so far as any claim for *injunctive* relief is concerned the matter is moot and past. Before petitioner's action was commenced on December 5, 1962, evaporated milk had been put on the PWC initiative list and on May 7, 1962, PWC, acting independently, had reduced the rates by the illegal increase of $2.50 per ton and to the rates which had applied before May 1, 1957 when they had been raised (Complt. par. 28, R. 24).

III.

KEOGH AND TERMINAL WAREHOUSE

Two decisions of this Court, to which some reference has been made by defendant-respondents, deserve comment, *Keogh v. Chicago & N.W. Ry.*, 260 US 156 and *Terminal Warehouse Co. v. Penn R. Co.*, 297 US 500.

Keogh was decided November 13, 1922. The opinion was written by Mr. Justice Brandeis. It is not likely that in writing in *Keogh* he overlooked or forgot what he had written less than 6 months before in *Great Northern Ry. Co. v. Merchants Elevator Co.*, 259 US 285. There is no suggestion of disagreement with anything in the earlier opinion. *Keogh* was a different sort of case. A shipper by rail sued eight railroad companies and others claiming that he had been charged by the carriers rates which were illegal under the antitrust statutes. Judgment was entered for defendants on overruling of a demurrer to a special plea. And no wonder. The plea set up that the rates had been duly filed with the Interstate Commerce Commission, that thereupon they had been suspended upon complaint of Keogh and that after extensive hearings, in which Keogh participated, the rates were approved by the Commission; and that the rates were not made effective until after they had been so approved. So, as the court states it, "The instrument by which Keogh is alleged to have been damaged are rates approved by the Commission. * * * All the

rates fixed were reasonable and nondiscriminatory. That was settled by the proceedings before the Commission." Accordingly, these rates were the legal rates and the only legal rates. The only rates which rail carriers can charge are those shown in their published tariff and they must charge those rates. Until they are set aside no other rates can be charged.[14] The Court pointed out:

> "The legal rights of shipper as against carrier in respect to a rate are measured by the published tariffs. Unless and until suspended or set aside, this rate is made, *for all purposes,* the legal rate, as between carrier and shipper. *The rates, as defined by the tariff, cannot be varied or enlarged by either contract or tort of the carrier.*"

This, of course, was enough to dispose of the case.[15] But the opinion went on with other comments, one of which is attempted to be availed of here. This was the remark that if shippers could sue under the antitrust statutes there might be discrimination because it was almost inconceivable that different juries would arrive at the same conclusions. This is what is sought to be seized upon here. But it can have no application in the case at bar because this is what the court was talking about in *Keogh*: If in *Keogh* an improper rate were charged, and if the plaintiff were entitled to make this claim, then the measure of his recovery would be the difference between the rate charged and a *reasonable* rate. Now different juries, on different, or even the same, evidence might very well find differently as to what a *reasonable* rate was. Some jury might find that the Commission approved rate was reasonable.

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14. This was by reason of express provision of the Interstate Commerce Act. At the time with which we are concerned there was no such provision in the Shipping Act, 1916, with respect to the rate to be charged by and paid to common carriers by water in foreign commerce. The Shipping Act, in this respect, was unlike the Interstate Commerce Act.

15. See the statement of the holding of *Keogh* in *Georgia v. Pennsylvania R. Co.,* 324 US 439, 453 as being: "The legal rights of a shipper against a carrier in respect to a rate are to be measured by the published tariff. That rate until suspended or set aside was for all purposes the legal rate as between shipper and carrier and may not be varied or enlarged either by the contract or tort of the carrier."

If the juries differed the bases for measuring recovery, if any, would likewise differ and there would not be uniformity in respect of the various suing shippers. Such a result is not possible in a case like that at bar because here the measure of illegality and damage, and the measure of recovery, is bound to be the same for every shipper, *the illegal $2.50 per ton exacted in excess of the legal rate. Keogh* **itself makes this precise point for us.**[16]

Terminal Warehouse presented a complicated situation. The case requires a more careful reading than we believe, with deference, has been given to it by counsel for defendant-respondents.

It is too long for detailed treatment here. It is enough to point out that it was one in which *only an Interstate Commerce Act violation was present;* that there was no actionable violation of the antitrust statutes; that "whatever liability was incurred through the forbidden discrimination was *under the Act to regulate commerce and not for treble damages*"[17] (p. 516); that "for the wrongs

16. *Keogh,* at p. 165, pointed out that there "recovery cannot be had unless it is shown that * * * damages in some amount susceptible of expression in figures resulted. * * * To make proof of such facts would be impossible in the case before us. *It is not like those cases where a shipper recovers from the carrier the amount by which its exaction exceeded the legal rate. Southern Pacific Co. v. Darnel-Taenzar Co.,* 245 US 531."

17. In a very complicated legal and factual situation it had been determined that discriminatory privileges had been granted by rail carriers. But the Court pointed out (p. 511) that these "are unavailing without more to make out a combination in restraint of trade or commerce within the meaning of the Anti-trust Laws. To lead to that result the privileges or payments must be the symptoms or incidents of an enveloping conspiracy with its own illegal ends. *In the absence of such a showing* a sufferer from discriminatory charges and allowances has his remedy under the Commerce Act for any damage to his business, and that remedy is exclusive against all the parties to the wrong." The Court made it clear (p. 515) that it did not intimate "that never in any circumstances can a carrier become a party to a conspiracy in restraint of trade or commerce with liability for treble damages" and gave examples by making certain assumptions. But it then went on (p. 516): "None of these assumptions affects the case at hand. For reasons already stated there was no conspiracy to monopolize the storage business to the destruction of Terminal or of

it denounced" the Interstate Commerce Act provided a fitting and exclusive remedy. "If another remedy is sought under cover of *another* statute, there must be a showing of *another* wrong, *not* cancelled or redressed by the recovery of damages for the wrongs *explicitly denounced.*"

There was no violation of the antitrust statutes in *this* case, not because they were repealed or superseded, but because *no violation of the antitrust statutes was charged.*

When there is a violation of the antitrust statutes there *is* "a showing of another wrong" and when, as under Clayton Act § 4, treble damages is the "whole to which" the injured party is entitled and anything less will not be "full satisfaction of his claim" then the wrong is not "cancelled or redressed by the recovery of" single damages or something less. (See Petitioner's Brief, p. 32)

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others similarly situated. There was no conspiracy to impose upon that business a burden of any kind, except to the extent that the enjoyment of a preference might increase the opportunities for a profit for the warehouse so preferred. Of any combination more far-reaching, more inclusive in its aims, there is silence in the record after every reasonable inference has been drawn from its pages. On the contrary, the history of the relation between Pennsylvania and Merchants indicates strongly that the illegal discrimination, far from being a symptom of a larger combination, was the product of a mistake of law." And "a preference innocent in purpose should not be magnified into a token of a circumambient conspiracy." In immediate sequence the court used the language quoted above in the text that whatever liability there was, *was under the Act to regulate commerce and not for treble damages.*

Slick Airways v. American Airlines, 107 F Supp (D.N.J.), app. dis. and writ den. 204 F2d 230 (Cir. 3), writ den. 346 US 806, reviewed *Terminal Warehouse* and said that the Court there held "that the gist of the complaint was merely discrimination in rates and the allowance of forbidden preferences, wrongs for which the Interstate Commerce Act provided a 'fitting' and 'exclusive' remedy" and where it appeared, at the trial, that plaintiff's "only damages were those resulting from the discriminatory acts and not from any conspiracy transcending those particulars. It was unable to show a conspiracy to establish a monopoly."

IV.

NEITHER THE GENERAL SCHEME OF THE SHIPPING ACT NOR THE SANCTIONS IT PROVIDES WORK A GENERAL EXEMPTION FROM THE ANTITRUST STATUTES OF WATER CARRIAGE IN FOREIGN COMMERCE

It will serve no purpose to take up here, one by one, the detail of, or to point out and correct, inaccuracies and incautious statements.[18] The necessary materials were supplied in anticipation in Petitioner's Brief. But the attempt, in the face of the deliberate and limiting provision for exemption from the antitrust statutes of Shipping Act § 15, to argue (a) a generalized exemption of all industry activities from the antitrust statutes because of the scheme of Shipping Act, 1916, and (b) a general and complete substitution of Shipping Act, 1916, sanctions for those of the antitrust statutes,—the sort of thing rejected in *Panagra*, 371 US 296, 304 (Petitioner's Brief, p. 91),—deserves short comment.

There is an attempt to argue a general exemption of water carriage in foreign commerce from Sherman Act § 1,—an industry exemption that exists for no other industry. The position taken is "that the complete program of the Shipping Act, 1916, for the substantive (§ 15) and remedial (§ 22) regulation of ocean carrier agreements superseded, *pro tanto*, the antitrust laws" (FEC Brief, pp. 1, 2). It is said: "Section 15, we submit, is a completely pervasive, substantive law regarding ocean carrier agreements" (FEC Brief, p. 43) and from this complete substitution for the antitrust laws is argued. At other places, however, the statement is made, which more closely approaches being accurate, that "Congress substituted a program of *regulated* agreements, in the case of ocean carriers, for the outright prohibitions of the antitrust laws, *with the regulation to be done by the Commission*" (FEC Brief, p. 6).

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18. As an example it is said (PWC Brief, p. 46) that carriers are prohibited by the Shipping Act from providing transportation at less than the regular rates. The actual provision, as to carriers in foreign commerce, was that of § 16 Second that it is unlawful for them to allow obtaining transportation "at less than the regular rates" etc. *"by means of false billing, false classification"* etc. *"or any other unjust or unfair device or means."*

The main theme of the Shipping Act, 1916, program is in § 15. It is a program for industry regulation by agreement. But the program is very far from one of freedom of agreement. The program is one of regulation only by agreements *which have received Commission approval*. This is clear from the language of the statute. The legislative history reinforces the proposition that the essential part of the program of Shipping Act, 1916, was not the making of agreements by those subject to the Act but *the exercise of Government control over the industry by control of those agreements*. The Committee report (H.R. Doc. 805, 63d Cong., 2d Sess., 416ff) is unambiguous. The advantages sought by the legislation, it is said,

> "can be secured only by permitting the several lines in any given trade to cooperate through some form of rate and pooling agreement *under Government supervision and control*."

And it was further said

> "that the disadvantages and abuses connected with steamship agreements and conferences as now conducted, are inherent, and can only be eliminated by *effective Government control;* and it is *such control* that the Committee recommends as a means of preserving to American exporters and importers the advantages enumerated, and of preventing the abuses complained of."

The plan of Congress was one of "Government supervision and control" and "effective Government control". The statute provided for this by permitting the making and carrying out of agreements *but only when approved by the Commission*. For this plan of Congress defendant-respondents, at least so far as private suitors and the anti-trust statutes are concerned, ask that the Court substitute a scheme of agreement *only*. They would give the same practical effect of elimination of the Sherman and Clayton Acts to unfiled agreements,—and complete *absence* of "Government supervision and control",—as to Government control and approval.

We submit, with deference to counsel upon the other side, that if the argument does not answer itself, § 15 answers with its provision for exemption *on approval*.

Turning from its scheme as a whole to the remedies provided by Shipping Act, 1916, defendant-respondents argue that the Act would not have provided a remedy by way of reparations if it were thought that the Clayton Act § 4 remedy of treble damages was available because, it is said in effect, Congress could not have been so stupid as to have supposed that anyone would use the Shipping Act remedy of application for reparation under § 22 if treble damages could be recovered under Clayton Act § 4. The answer is simple and complete. Shipping Act, 1916, provided for reparations for damage resulting from violation of *its* provisions because there are many wrongs under *that* Act causing damage *which are not violations of the antitrust statutes*. (Cf. *Terminal Warehouse*, above.) The argument was anticipated. We respectfully call attention to p. 39 of Petitioner's Brief.

Finally it is suggested that to permit a suit for treble damages under Clayton Act § 4 would be disruptive of the scheme of Shipping Act, 1916. But there is only one real difference between treble damages under Clayton Act § 4 and reparations under Shipping Act, 1916, assuming that both remedies are made available by the same conduct. The *only* real difference is that under Clayton Act § 4 the defendant pays three times what he would pay in reparations under the Shipping Act. This is the *only* real difference. This has no effect on the operation of the Shipping Act, although treble damages have an unpleasant effect on the amerced defendant. The failure to appreciate this want of difference in the effect of the remedies is due to a failure to appreciate the scheme of the Shipping Act civil remedy by way of a money award.

Awarding of reparations by the Commission under Shipping Act, 1916, § 22, by an order for the payment of money, *is only a prologue*. This award cannot be enforced. The order is only an opening for a § 30 plenary action at law, not *on* the award but

on the original claim. This calls for a full scale trial in the District Court, jury included. (See Petitioner's Brief p. 38 and note 37 and especially the quotation from *United States v. I.C.C.*, 337 US 426, 445.) The result would not be different from that in a Clayton Act § 4 action except that in the latter, upon return of a jury's verdict for the plaintiff, the amount is trebled. It can not be seriously urged that a Clayton Act § 4 action would be any more disruptive of the scheme and operation of Shipping Act, 1916, than this Shipping Act § 30 action. The only differences are the *prima facie* value of an award under § 22 in the § 30 action, a matter of no significance if the court differs from the Commission on a controlling point of law, and which in some Clayton Act § 4 actions might be compensated for by *prima facie* evidence under Clayton Action § 5(a) (15 USC § 16(a)), and the trebling of the award in the Clayton Act proceeding. If there are other differences we have yet to see them pointed out.

A District Court judgment for Clayton Act damages for past conduct would no more interfere with the Commission's dealing, in the future, with the matter in question, or any other matter, than would a District Court judgment in a Shipping Act § 30 action.

CONCLUSION

It is respectfully submitted that the judgment should be reversed and the cause dealt with as prayed in Petitioner's Brief.

San Francisco, California, November 3, 1965.

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CERTIFICATE OF SERVICE

I, Arthur B. Dunne, certify as follows:

I am a member of the Bar of the Supreme Court of the United States. I represent Carnation Company, Petitioner in the above entitled matter, in whose behalf service of the foregoing brief has been effected as herein stated.

I certify that on or before November 3, 1965, I served the foregoing Brief on behalf of Petitioner upon the respondents and the Solicitor General of the United States by service of three (3) copies upon the Solicitor General of the United States and three (3) copies on each of the respective attorneys for respondents whose appearances have been entered herein by mailing the same at San Francisco, California, postage prepaid, first class mail to the addresses in San Francisco, California, and airmail to the other addresses, as follows:

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